(A)

No. 94-588

SUPREME COURT, U.S.
FILED
NOV 4 1994
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1994

In Re

WALTER F. BIGGINS,

*On Petition for a Writ of Mandamus/or in the Alternative, for a Writ of Certiorari to the United States Court of Appeals for the First Circuit*

## REPLY BRIEF FOR PETITIONER

JOHN J. EGAN
*Counsel of Record*
MAURICE M. CAHILLANE
EDWARD J. McDONOUGH, JR.
EILEEN Z. SORRENTINO
EGAN, FLANAGAN AND COHEN, P.C.
*Attorneys for Petitioners*
67 Market Street
P.O. Box 9035
Springfield, Massachusetts 01102-9035
(413) 737-0260

5680
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

13 pp

## TABLE OF CONTENTS


*Page*

I. Respondents' Opposition Concedes the Requirement of an Error of Law for an Appellate Court to Order a New Trial But Ignores the Fact That the Circuit Court Found No Error. ..... 1

II. The Respondents Cannot Justify the Circuit Court's Failure to Adhere to the Mandate of this Court. ..... 5

III. Even If the Alleged Error Existed It Could Not Properly Be Raised at this Time. ..... 6

IV. Respondent's Opposition Makes Clear the First Circuit's Refusal to Follow *St. Mary's Honor Center.* ..... 9


## TABLE OF CITATIONS

**Cases Cited:**


*Allied Chemical v. Daiflon,* 449 U.S. 33 (1980) ..... 4

*Capital Traction Co. v. Hof,* 174 U.S. 1 (1899) ..... 4

*Carlson v. Green,* 446 U.S. 14 (1980) ..... 8

*City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981) ..... 7,8

*Deen v. Hickman,* 358 U.S. 57 (1958) ..... 5

*McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548 (1984) ..... 4,6

*Contents*


| | Page |
|---|---|
| *Morris v. Travisono*, 528 F.2d 856 (1st Cir. 1976) ..... | 8, 9 |
| *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433 (1830) ..... | 4 |
| *Silber v. United States*, 370 U.S. 717 (1962) ..... | 8 |
| *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) ..... | 9, 10 |
| *Wood v. Georgia*, 450 U.S. 261 (1981) ..... | 8 |
| *Youakim v. Miller*, 425 U.S. 231 (1976) ..... | 8 |

## I. Respondents' Opposition Concedes the Requirement of an Error of Law for an Appellate Court to Order a New Trial But Ignores the Fact That the Circuit Court Found No Error.

Respondents' brief makes clear that the circumstances of this case provide no justification for the en banc court's extraordinary action in ordering a new trial sua sponte based on its suspicions about the jury verdict. Respondents' opposition effectively concedes the petitioner's major premise: that absent an error of law, an appellate court has no power to order a new trial. Respondents do not dispute this, but rather attempt to contrive a justification for the en banc court's order by asserting that the en banc court's order "rests squarely" on an error of law, which the respondents variously describe as the petitioner's "theory" of the case (Resp. brief, p. 12), or its "presentation of the case" (Resp. brief, p. 10, n.4). Thus the respondents argue that (a) there is authority for the awarding of a new trial where an error of law has created jury confusion, and (b) the Circuit Court here "identified" such an error, (c) therefore, there was no violation of the Seventh Amendment or of this Court's mandate.

Respondents' argument is a house of cards which collapses on even superficial scrutiny. Its most obvious flaw is that the en banc court's order does not "identify" any error of law. Respondents attempt to contrive the existence of one in order to find some possible justification for the en banc court's order.

The petitioner did not argue that a Circuit Court does not have the power to grant a new trial *when it finds error below* that has been properly raised and addressed. The opposition on pages 9, 10 and 11 provides twenty-seven separate citations which they assert stand for the proposition that "numerous federal courts of appeal have in fact ordered a new trial where, as here, they have found a substantial likelihood that the jury was confused when it reached

its verdict on a claim before it." (Resp. brief, p. 9). Each and every one of those cases involves a situation where the Circuit Court found prejudicial errors of law in the proceedings below. The first issue presented by the petitioner to this Court is whether the Court of Appeals could order a new trial *sua sponte* based on its speculation about the jury *where there was no finding of error in the proceedings below.* (Pet. p. i). The respondents' opposition fails to cite one case where a Circuit Court has ordered a new trial without a finding of prejudicial error below. The respondents' attempt to ignore or confuse the real issue presented in the petition evidences the correctness of the petitioner's position that a Circuit Court has no independent authority to grant a new trial based on its own view of the evidence.

To justify the en banc court's order, the respondents eventually claim it must be the result of a finding of an error of law in the proceedings below. (Resp. brief, p. 15). The order of the en banc court not only finds no error in the proceedings below, it never mentions the word error at all, let alone find an error occurred and determine it to be prejudicial. (Pet. App. B, 9a-12a). Instead of finding error, the circuit muses about " . . . the likelihood of verdict contamination with respect to the count at issue [being] sufficiently great that the interests of justice require a full new trial on the age discrimination claim." (Pet. App., p. 9a).

The circuit having failed to find error below, and the case law requiring it, the respondents simply "fill in the blanks" and attempt to divine the reasons for the imaginary error they have manufactured out of the en banc court's order. Respondents claim the "error" creating jury confusion consists of the contents of the petitioner's complaint and two sentences, one from petitioner's opening statement and one from his closing statement:

> . . . ("Biggins knew that the technical department was comprised of four people.

> Himself, age sixty-two and nearing pension vesting [and] [t]hree people in their thirties . . . . This age was used against him to attempt to force him to sign over [a manufacturing] process and to attempt to take away from him valuable rights . . . .”). . . .(“Sixty-one, sixty-two. Almost vested in his pension. But they needed the pretext.”) *(See* Trial Transcript, at pp. 237, 1053.)

(Resp. brief, p. 14).

These events cannot support a claim of error. The jury never saw the Complaint, so it obviously could not have confused them.[1] The references to four lines in a five day trial transcript encompassing well over 1,000 pages and 25,000 lines serves simply to demonstrate the absurd lengths to which the respondents must go to attempt to justify the “error” they try to read into the opinion of the Circuit Court. The statements themselves show no more than that petitioner’s counsel mentioned age and pension in the same sentence twice in the entire trial, without even stating there was a connection between the two. The statements referenced are all factually correct and made in the context of a trial at which the jury was given separate instructions and special questions (including on damages) on the ADEA and ERISA issues.

This elusive “error” was never objected to at trial, was never argued in the post-trial motions, was never appealed or argued in any papers filed with the Circuit Court or at any of the circuit hearings, and yet today serves as the only explanation the

---

1. Continuing in this vein, respondents also assign as part of the “error” supposedly creating jury confusion, the *post trial* sufficiency of the evidence arguments advanced to the District Court and the Circuit Court as if these legal arguments had somehow influenced the jury when in fact they were not presented to the jury at all. (Resp. brief at 14-15).

respondents can concoct to seek to justify an order of the Circuit Court which is devoid of any reference to an error of law. Indeed, what the respondents now refer to as "plain error" was never objected to or discovered by them until they filed this opposition to the petition. Even after this Court's opinion, respondents did not discover this "error" or present it to the First Circuit for consideration. More significantly, even after the March 1, 1994 (Pet. App., p. 13a) order of the en banc court, which contained the very same analysis and reasoning as its final order, the respondents made no reference whatsoever to this so called error, an error so "plain" and "obvious" it has taken respondents 4 1/2 years to discover it and has never been so much as mentioned by the District Court, the First Circuit panels (twice), this Court, or the en banc court itself.

The final, fatal flaw in the respondents' argument that the en banc court really found an error of law, but forgot to mention it, is the absence of any analysis by the en banc court of whether or not such error was actually prejudicial. Fed. R. Civ. P. 61 absolutely requires such analysis and is binding upon an appellate court. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 554 (1984).

Respondents' opposition, therefore, is totally devoid of any challenge to those cases where this Court has directly affirmed the Seventh Amendment's limitations on the Circuit Courts' power to grant a new trial and has affirmed that absent a finding of prejudicial error below, the Seventh Amendment prohibits a Circuit Court from granting a new trial on its own. *Parsons v. Bedford, Breedlove & Robeson,* 28 U.S. 433, 447-8 (1830); *Capital Traction Co. v. Hof,* 174 U.S. 1, 13 (1899); *Allied Chemical v. Daiflon,* 449 U.S. 33, 36 (1980); *McDonough Power Equip., Inc. v. Greenwood,* at 556.

The clear reasoning of these cases compels the intervention of this Court to protect the Seventh Amendment rights of the petitioner and correct the Circuit Court's dangerous misapprehension of its power.

## II. The Respondents Cannot Justify the Circuit Court's Failure to Adhere to the Mandate of this Court.

Respondents also fail to effectively dispute the Circuit's failure to adhere to this Court's mandate. Respondents' attempt to distinguish *Deen v. Hickman,* 358 U.S. 57 (1958), fails. The only distinction they can point to is that in *Deen* this Court itself passed on the sufficiency of the evidence rather than ordering the lower court to do so. That is not a distinction which would permit the Circuit Court to take a different course of action on a different issue. Respondents then blame this Court for having precipitated for the "first time" the issue of jury confusion by its opinion that the pension evidence could not be used to sustain the ADEA verdict. The assertion that this Court's opinion on the sufficiency of the evidence somehow unexpectedly "created" an issue of jury confusion is preposterous. Respondents had claimed from the time of the verdict that the pension evidence could not be used to support the verdict and raised that as the issue in their petition to this Court. Clearly if this issue also created the question of jury "confusion," respondents could have argued it long ago and brought it to this Court's attention.

Respondents go further still in attempting to distinguish *Deen* by arguing that after this Court instructed the First Circuit to address whether the verdict could be sustained, absent the pension interference evidence, the First Circuit then did "precisely" that (Resp. brief, p. 19). The en banc court's order says absolutely nothing about "whether the jury's verdict could be sustained" in light of this Court's opinion. Having first rewritten the en banc court's order to create an imaginary error of law, respondents now

further seek to rewrite the court's order to include an analysis of the sufficiency of the evidence which plainly does not exist.

That the respondents must, in order to find some possible justification for the en banc court's order, attempt to rewrite that order into something it is not, merely serves to dramatize how far afield the Court of Appeals has gone.

## III. Even If the Alleged Error Existed It Could Not Properly Be Raised at this Time.

Assuming for the sake of argument that the en banc court found any error of law, and further assuming for the sake of argument that it could have had any power to order a new trial despite the *McDonough Power Equip., Inc.*, case, this issue still could not be raised sua sponte by the en banc court at this stage, and none of the cases cited by the respondents supports the notion that it could have been. It should be borne in mind that the alleged "error" which respondents claim exists and which they allege to be the subject of the en banc court's order was not objected to during trial, not objected to at the conclusion of trial, not raised in post trial motions, including a motion for new trial based on the possible confusion of age and pension discrimination, not raised in the first appeal to the First Circuit, not raised in the first rehearing petition to the First Circuit, not raised in the petition for certiorari to this Court, not raised in the briefs or oral argument before this Court, not raised on remand to the First Circuit, not raised in the respondents' petition for rehearing in the First Circuit, not raised in the briefs in response to the en banc court's order of March 27, 1994, which respondents allege was citing this "error" and not even mentioned in the en banc court's order.

To suggest that such an error which allegedly occurred at trial could now be raised by the court or the respondents makes a mockery of the appellate process.

There is simply no authority which would permit or even countenance the raising of a new "error" for the first time after this many proceedings, let alone *after* full argument and opinion in this Court. If such a practice is permitted to stand, no decision or verdict can ever be regarded as final, and every litigant will feel free to raise any possible issue or alleged error even after *multiple* appellate proceedings.

Respondents' cited authorities are not to the contrary. Respondents rely principally on *City of Newport v. Fact Concerts Inc.*, 453 U.S. 247 (1981). There, this Court held that it would review a jury instruction which was not objected to at trial (although the District Court addressed it post-trial) *not* because it was a "plain error,"[2] but because:

> In addition to being novel, the punitive damages question is important and appears likely to recur in §1983 litigation against municipalities. And here the question was squarely presented and decided on a complete trial record by the court of first resort, was argued by both sides to the Court of Appeals and has been fully briefed before this Court. In

---

2. Respondents' assertion that the "novelty" of the legal issue here exempts them from the requirement of plain error would only mean that they would also have to meet the above *Newport* standards in order to be able to raise the issue at this stage, and this they cannot do. More importantly, *Newport* explains that there can be no "plain error" where standards are "evolving" and "uncertain" as respondents now allege they are. *Newport* at 256. Consequently, if respondents' excuse is the novelty of the issue, they must be held to the standard of *Newport* and cannot claim plain error. Nor can respondents reasonably claim that the "novelty" of the issue kept them from raising it: the issue of the pension evidence as support for the ADEA verdict is specifically addressed at least as far back as the District Court's opinion (Pet. App. F, p. 34a-35a).

> light of all these factors we conclude that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration.

*Newport v. Fact Concerts* at 257.

*None* of these standards applies here and no one could rationally suggest that the ordering of a new trial by the First Circuit promotes "efficient judicial administration" when it forces the parties to undo seven years of litigation and start all over again.

Respondents' other citations would not justify the en banc court raising the issue now. For instance, *Youakim v. Miller,* 425 U.S. 231 (1976), only *remanded* the case to the District Court to consider an issue raised by the complaint, but not previously dealt with. In *Wood v. Georgia,* 450 U.S. 261 (1981), a conflict of interest issue was *remanded* because the party's prior lawyer was himself the focus of the conflict claim and the other party had repeatedly raised the issue. *Wood v. Georgia,* 450 U.S. at 265, n.5. In *Carlson v. Green,* 446 U.S. 14 (1980), the question was presented in the petition for certiorari, was fully briefed, was an important recurring issue and the opposing party had no objection. *Carlson v. Green,* 446 U.S. at 17 n.2. In *Silber v. United States,* 370 U.S. 717 (1962), the issue was squarely considered by the trial court and was ruled an obvious error. No similar circumstance was presented here to the First Circuit, which received the case on remand, and the issue had never been previously raised either below at the First Circuit or *above* in this Court. Clearly the First Circuit's own standards would not permit the raising of a new issue at this time. In *Morris v. Travisono,* 528 F.2d 856, 859 (lst Cir. 1976), the Court "acknowledged the existence of the plain error exception" but stated (in deciding that review was *precluded* by failure to object at trial):

> . . . it is noteworthy that to the best of our knowledge this Court has *never* reversed a civil case on this basis . . . [I]f there is to be a plain error exception to Rule 51 at all it should be confined to the exceptional case where the error has seriously affected the fairness, integrity or public reputation of judicial proceedings.

*Morris v. Travisono* at 859 (Emphasis supplied).

Respondents, therefore, ask this Court to believe that the First Circuit, acting en banc, decided to do what it had never done in its entire history, without reference to what the error was and without any explanation as to why it was abandoning its longstanding principles.

## IV. Respondent's Opposition Makes Clear the First Circuit's Refusal to Follow *St. Mary's Honor Center.*

Respondents do not confine themselves to rewriting the en banc court's order, they also strive to rewrite this Court's opinion in *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993). Respondents' whole argument is premised on the assertion that *St. Mary's Honor Center* means that a factfinder's disbelief of the reasons put forward by the defendant may only suffice to show discrimination *in some cases* (Resp. brief, p. 21).

This is the interpretation of *St. Mary's Honor Center* which the First Circuit is now following, as petitioner noted in his Petition at pp. 27-30. In adopting this interpretation, the respondents (and the First Circuit) take this Court's unambiguous statements that a prima facie case together with disbelief of the defendants ' reasons and a finding of discrimination by the factfinder "may suffice, to show intentional discrimination," "*will* permit the trier of fact" to find intentional discrimination and "is *enough* at law to sustain"

such a finding and treats them as stating "sometimes" they will permit a finding. *St. Mary's Honor Center* at 2749 and n.4. Such an interpretation deprives *St. Mary's Honor Center* of any rational meaning and would permit a standardless review of the evidence by appellate courts who could then apply this Court's carefully developed statutory interpretation only when they felt like it.

Like the attempt to rewrite the en banc court's order, this rewrite of this Court's opinion makes clear that the Circuit Court is refusing to obey this Court's mandate to analyze the sufficiency of the evidence in light of St. *Mary's Honor Center* and that, consequently, this Court's intervention is necessary.

Respectfully submitted,

JOHN J. EGAN
*Counsel of Record*
MAURICE M. CAHILLANE
EDWARD J. McDONOUGH, JR.
EILEEN Z. SORRENTINO
EGAN, FLANAGAN AND
COHEN, P.C.
*Attorneys for Petitioners*
67 Market Street
P.O. Box 9035
Springfield, MA 01102-9035
(413) 737-0260